

Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors

by Sheri R. Glaser

IN 2001, MAKBUBA ARIPOVA LOST HER HUSBAND to a ring of organ traffickers when the ring enticed him to travel abroad with the promise of a job. Days after he supposedly left for Canada, investigators found his mutilated body dumped in their hometown of Bukhara, Uzbekistan. Investigators also found the bodies of his sister, brother-in-law, and their three children, who were supposed to emigrate with him. Authorities prosecuted three suspects for these killings. When the police searched the suspects' home, they found evidence that Makbuba's family and others were victims of trafficking in organs. The police reportedly found bags containing human body parts with missing organs, 60 passports from people who were missing, and £6,000, a large sum of money given that the average monthly salary at the time was £10. Investigators believe this could be the proceeds of organ sales.

Trafficking in organs is a crime that occurs in two broad categories. First, there are cases where traffickers force or deceive the victims into giving up an organ, as happened with Makbuba's family. Second, there are cases where victims formally or informally agree to sell an organ and are cheated because they are not paid for the organ or are paid less than the promised price.

Currently, the international community has not responded adequately to the problem of organ trafficking. Legal provisions exist prohibiting this crime, but, where there are provisions, there are often weak enforcement policies and few prosecutions. For example, the Council of Europe, a political organization of 46 European nations, stated that even though most member states have legal provisions against organ trafficking, many of these provisions do not explicitly set out who has criminal responsibility. Much remains to be done to reduce or eliminate illegal trafficking in organs, such as passing and enforcing laws against the crime and organizing public education campaigns for victims and potential sellers. This article highlights "presumed consent laws" as the best practice method of increasing the legal organ supply and encourages nations to adopt mandatory reporting requirements for doctors who suspect the organs they receive for transplants are products of trafficking.

First, this article explains the demand fueling organ trafficking and examines the existing legal framework for this crime. Next, this article analyzes presumed consent laws and determines whether they work to diminish the black market for organs. Finally, it argues that doctors should have an obligation to report suspected cases of organ trafficking.

SCOPE OF THE PROBLEM: SUPPLY AND DEMAND

IMPROVEMENTS IN MEDICAL TECHNOLOGY and surgical techniques have increased the success rate of organ transplants, thereby increasing the demand for organs. This demand, however, has not been met adequately. Consequently, as of December 26, 2004, in the United States alone, around 77 percent of the 87,364 patients on the official organ waiting list had not received trans-

plants. Because the organ supply cannot meet the rising demand, a global black market in organs has grown and flourished. This black market thrives internationally in many forms, although it is extremely difficult to measure its extent due to its secretive nature.

In China, for example, officials remove organs from executed prisoners to use in transplant surgeries. Although China's official stance is to ban the buying or selling of human organs and tissues, this practice operates nonetheless on a clandestine level and contributes to the black market in human organs. The Chinese government has enacted regulations marked for "internal circulation only" that establish guidelines for this practice.

Organ trafficking has developed as a by-product of China's death penalty policy. To address rising crime rates, China conducts "Strike Hard Campaigns." During these campaigns, the government makes thousands of arrests, imposing tough punishments. For example, Amnesty International reported in March 2004 that China executes 15,000 people per year and that 69 percent of the nation's executable offenses in the criminal code are for non-violent crimes. Human rights activists also report that Chinese officials systematically remove kidneys, corneal tissue, liver tissue, and heart valves from executed prisoners, giving them to well-connected Chinese, or, more often, selling them on the black market for up to \$30,000.

Many facets of the Chinese infrastructure have vital roles in perpetuating organ trafficking, including court officials who quickly settle cases and deny death sentence appeals to ensure that prisoners are executed at the optimal time for organ harvesting for the recipients. Reportedly, court officials also inform doctors when they order death sentences so that doctors know when to contact the prison to make a match for the transplant patient. Further reinforcing the clandestine nature of its organ trafficking policy, one of China's "internal" rules, the Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Prisoners, enacted in 1984, states that "the use of organs of executed criminals must be kept strictly secret, and attention must be paid to avoid negative repercussions." Consequently, most doctors and public officials in China deny knowledge of the practice.

THE LEGAL FRAMEWORK FOR ORGAN TRAFFICKING

ORGAN TRAFFICKING VIOLATES FUNDAMENTAL HUMAN RIGHTS, such as the rights to life, liberty, security in person, and freedom from cruel or inhumane treatment. As such, several international organizations have established standards on organ trafficking. These include the World Health Organization's Guiding Principles on Human Organ Transplantation (1991); the World Medical Authority, which has denounced the commercial use of organs since 1985; the Council of Europe's Convention on Human Rights and Biomedicine (1997) and its Optional Protocol Concerning Transplantation of Organs and Tissues of Human Origin (2002); and the Bellagio Task Force, a working group that Columbia University established to draft a document regarding the use of organs for transplants. In addition, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons includes

“organ removal” and its subsequent sale as an end purpose of trafficking.

Many nations have also passed domestic laws prohibiting organ trafficking, but the crime continues to thrive, often due to corruption. For example, despite adopting the Transplantation of Human Organs Act in 1994, the human organ trade is still widespread in India. The Act bans the sale of human organs and all transplants except in situations where a relative donates an organ. There is a large loophole in the Act, however, which stipulates that hospital authorization committees can allow non-related donors to donate organs for transplants if they are “emotionally close” to the patient, a term that has been very loosely defined. On numerous occasions, these committees have determined that people who are from different nations and speak different languages meet the “emotionally close” standard. Dr. Sandeep Guleria, a professor at the All India Institute of Medical Sciences, estimates that about 64 percent of all the renal transplants in India in early 2001 were from non-related donors.

South Africa passed the Human Tissue Act of 1983, which states that no one can transfer any tissue, including flesh, bone, organ, or body fluid, in exchange for payment. Individuals who violate this Act are subject to imprisonment of no more than one year or a fine of a maximum of \$300. There is a large loophole in this Act as well because it grants a hospital’s medical director and pathologist the right to remove tissues and organs without consent if the identity of the deceased person is initially unknown and relatives have not come forward to claim the body within the period when organ retrieval is medically feasible. This provision can encourage corruption.

PRESUMED CONSENT LAWS

APPROXIMATELY 15 TO 20 NATIONS have enacted presumed consent laws for organ donation. These laws are intended to produce a surplus of organs for transplant surgery, establish equity in the distribution of organs, and end any illicit trade in organs. They essentially create situations where people must opt-out of being an organ donor, rather than opt-in, as in the United States and other countries.

These laws vary in terms of their strength. For example, many of the European laws are weaker, meaning they have easy opt-out provisions. In France the family is given an opportunity to stop the donation, even if the deceased expressed his or her desire to be an organ donor. Where the system of presumed consent is weak, it does not increase organ supply to the point of meeting demand. Instead, those systems operate like the opt-in system in the United States because people who would have chosen to remain a non-organ-donor in the United States may stop a family member’s donation and opt themselves out of being organ donors. Such systems do not effectively increase the supply of organs.

In contrast, Brazil’s Presumed Organ Donor Law is an example of a strict presumed consent law, where it is more difficult to opt-out. The law defines all Brazilian adults as universal organ donors unless they officially declare themselves “non-donors of organs and tissues.” In order to opt-out, citizens must have “non-donor of organs and tissues” permanently stamped on their civil identity card or driver’s license. Citizens must pay for their documentation, which presents an economic hardship and thus a major hurdle for many in Brazil. Additionally, citizens must navigate various bureaucratic obstacles in order to opt-out. For example, authorities reportedly told Maria Celestina de Oliveira Pinto, a

domestic worker in Sao Paulo, that she was not allowed to declare herself a non-donor when she went to get her new documents. She reportedly had to wait in line four times and argue before she received a “non” before the word “donor” on her card.

Though strict presumed consent laws effectively increase supply, they may create unfair hardships on those individuals who wish to opt-out. States that pass strict presumed consent laws should make the process by which citizens opt-out free of charge and simpler than Brazil’s system.

IMPACT OF PRESUMED CONSENT LAWS

Presumed consent, when the state strictly follows it, is the best-practice method of legally obtaining organs. In countries with presumed consent laws, there is a higher procurement rate for organs than in countries without these laws. Many argue that if the demand for organs were met legally, then people would have less incentive to illegally obtain organs and the black market would eventually diminish. On a more basic level, if there were more organs available for transplant, then more people’s lives would be saved.

“This black market [in organs] thrives internationally in many forms, although it is extremely difficult to measure its extent due to its secretive nature.”

In addition, presumed consent leads to improvements in tissue matching between donor organs and recipients, and it allows surgeons to be more particular about which organs are selected. Furthermore, these laws allow for more careful application of brain-death criteria because the increased supply of donor organs diminishes incentive to obtain organs through “inappropriate” means. For example, there have been cases in Russia and Argentina where organs were removed from comatose patients who were prematurely declared brain-dead. Presumed consent also ensures that organs are “fresher” because it eliminates the doctor’s need to contact the deceased’s next of kin, thus shortening the time between death and determination of consent. Lastly, the decision as to whether or not to donate organs is not made during the grieving period immediately following someone’s death.

Financially, presumed consent lowers costs on the part of the government. For example, in the United States, with a federally funded dialysis program, the cost of a kidney transplant, taking into account the cost per year after the transplant for further medical care, is less than the yearly cost of dialysis. One could reasonably argue that, as kidney transplants become even more commonplace, the costs will continue to fall. If a nation has a system of presumed consent and has more organs available for transplants, then that nation will presumably be performing more transplants and will have fewer patients on dialysis, thus lowering government costs.

Critics argue that presumed consent will result in a situation where only advantaged groups, such as the wealthy and educated, will exercise their choice to opt-out because groups such as the poor and uneducated will not be aware of their opportunity to exercise autonomy. One solution could be to promote public education about presumed consent laws and the opportunity to opt-out. This would ensure that the next of kin knows that the donor made an informed decision to donate while he or she was alive, and that donors' overall autonomy will be respected.

There is also the fear that a doctor will remove the organs of someone who has opted-out, thus violating the deceased's wishes. While this would be a serious violation of donor autonomy, this is much more likely to occur in situations where a nation has imposed a system of strict presumed consent that does not require doctors to make a reasonable search to determine whether an individual has opted-out of the system. In order to avoid this scenario, nations should require doctors to verify whether or not patients have opted-out prior to removing any of their organs.

HOLDING DOCTORS ACCOUNTABLE

IN ORDER TO REDUCE AND ELIMINATE ORGAN TRAFFICKING, countries also should impose mandatory reporting requirements on doctors who suspect that a patient has obtained a trafficked organ. Dr. Nancy Scheper-Hughes of Organs Watch, a human rights group in Berkeley, California, has commented that transplant doctors have developed a "don't ask, don't tell" policy regarding the underground trade in human organs. Although doctors have a legal obligation to keep information about their patients confidential, they can break this obligation on the grounds of the "protection of the public" exception.

The "protection of the public" exception permits a doctor to reveal confidential information about a patient if the doctor has grounds to think that the patient's medical condition is a risk to others and that disclosure is necessary to protect the public from such a risk. The harm from a doctor breaking his or her duty of confidentiality to a patient includes potential embarrassment to the patient and damage to his or her reputation for the patient's decision to obtain an organ from a trafficked person. Considerations of the public interest outweigh this harm, however, because organ trafficking is a risk to the public and a crime involving egregious violations of human rights. Misleading or forcing someone into giving up an organ is a violation of personal autonomy. Furthermore, human rights are violated even when someone agrees to sell an organ because putting a price on body parts essentially exploits the desperation of the less fortunate. Organ routes reportedly flow from underdeveloped countries to developed countries, black and brown to white, and poor to rich.

Reporting is also in the public interest because the donor-victim can end up with serious health problems due to the transplant. A study in 2002 found that 86 percent of Indian organ donors reported significant declines in their health within three years after surgery. A study by Organs Watch found that 79 percent of Moldovan donors experienced health problems after their procedures.

In one such case, Gheorghe Ungureanu, from Moldova, was coerced and deceived into selling his kidney in 1999. A trafficking ring promised him a factory job where he could earn more than he was earning as a farmer, but instead of taking him to Israel to work,

the ring took him to Turkey to remove his kidney. They forced him to sign papers agreeing to the removal, and now, at 48 years old, he is no longer able to do heavy work.

The recipient may experience health problems as well because organs procured on the black market often do not meet the quality standards that the recipient's home country requires. Donors also may inadvertently impose health risks on recipients if they conceal adverse information about their health to ensure they are not ruled out as a potential candidate for "donation," relinquishing their receipt of any subsequent payment.

There are several additional benefits to the public interest that would accrue from a doctor's decision to report that a patient has obtained an organ from a trafficked person. First and foremost, it could save many people from organ trafficking. Reporting such an incident to the proper authorities could be an integral way to break up entire organ trafficking rings because reporting might lead to questioning and prosecuting people involved in the ring. As authorities break up trafficking rings, potential victims are saved from being trafficked and re-trafficked by those rings.

It is up to countries to decide whether to take steps to penalize doctors for failing to report suspected cases of organ trafficking. Since the true culprits in organ trafficking are the trafficking rings, which lure or coerce the victims, laws should punish these people more severely than the doctors. Doctors also play an integral part in organ trafficking, however, because transplants would not be possible without their help. Trafficking in organs is a crime, and a doctor who fails to report a suspected instance of organ trafficking furthers that crime. In light of this, punishment for doctors could consist of administrative, civil, or criminal penalties, depending upon the level of their intent and knowledge. For example, if doctors know that a transplant organ is from a trafficked person and intend to assist the trafficking ring in performing the transplant, then the doctors may be charged with accomplice liability. If doctors do not have the requisite intent, then a more appropriate penalty may be to revoke their license or impose a fine. Doctors generally know where a patient's transplant organ comes from, and if they suspect the organ is from a questionable source, then they have an obligation to report their suspicions to the proper authorities.

CONCLUSION

TRAFFICKING IN ORGANS IS ILLEGAL and violates fundamental human rights. Currently the international community has not adequately responded to this problem. To reduce or eliminate organ trafficking, countries should (1) strengthen their laws against this crime and remove any loopholes that encourage corruption; (2) adopt presumed consent laws to increase organ supply legally, which would reduce the number of organs obtained on the illegal black market; and (3) impose mandatory reporting requirements on doctors who suspect that a patient has obtained an organ from a trafficked person. If these recommendations are not followed, organ trafficking will continue to persist, exploiting the less fortunate and violating the autonomy of its victims.

HRB